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TABLE OF CASES

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

Nos. 69 and 71

BROTHERHOOD OF LOCOMOTIVE ENGINEERS, ET AL.,
Appellants,

—*v.*—

CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY, ET AL.,
Appellees.

ROBERT N. HARDIN, PROSECUTING ATTORNEY FOR THE SEVENTH JUDICIAL CIRCUIT OF ARKANSAS, ET AL.,
Appellants,

—*v.*—

CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY, ET AL.,
Appellees.

ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF ARKANSAS

BRIEF OF ASSOCIATED RAILWAYS OF INDIANA, ASSOCIATED RAILROADS OF MASSACHUSETTS, NEW YORK STATE ASSOCIATION OF RAILROADS, OHIO RAILROAD ASSOCIATION, TEXAS RAILROAD ASSOCIATION, WASHINGTON RAILROAD ASSOCIATION AND WISCONSIN RAILROAD ASSOCIATION AS AMICI CURIAE IN SUPPORT OF APPELLEES

This case presents the question whether the enactment by Congress of Public Law 88-108, 77 Stat. 132, 45 U. S. C. following Sec. 157, the Award of Arbitration Board No.

282 and the local Awards by the Special Boards of Adjustment pursuant thereto (the "federal regulation") have superseded the Arkansas statutes prescribing crew consists of freight trains and yard assignments.

The Associated Railways of Indiana, Associated Railroads of Massachusetts, New York State Association of Railroads, Ohio Railroad Association, Texas Railroad Association, Washington Railroad Association and Wisconsin Railroad Association, which have submitted this *amici* brief, represent the railroads in the other states having crew consist laws.[1] The determination of the issue of preemption by this Court will undoubtedly be dispositive of this issue in suits which are now pending in several of these states.[2] This case is therefore of vital and immediate concern to the Associations and their members.

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[1]Ind. Stats. §§ 55-1326 through 1338 (1951); Mass. Ann. Laws, c. 160 §§ 154 and 185 (1959); N. Y. Railroad Law §§ 54-a, 54-b, 54-c (1952); Ohio Code §§ 4999.06-.08 (1954); Tex. Civ. Stats. Art. 6380 (1926); Wash. Rev. Code §§ 81.40.010-.030 (1962); Wis. Stats. § 192.25 (1957). In addition there are also crew consist laws in Maine and Nevada. Me. Rev. Stat. c. 46, § 60 (1954); Nev. Rev. Stats. §§ 705.390-.420 (1963). However, the statute in Maine applies solely to passenger trains "moved by steam." The crew consist laws in Texas and Nevada have been held not to require the assignment of firemen on diesel locomotives. *Southern Pacific Company* v. *Dickerson*, 397 P. 2d 187 (Sup. Ct. Nev. 1964); *Texas* v. *Southern Pacific Co.*, 392 S. W. 2d 497 (Tex. Civ. App. 1965), *writ of error refused* (Sup. Ct. Tex. 1965).

[2]A temporary injunction against enforcement of Indiana's crew consist laws has been granted by the lower court in Indiana. *New York Central R. Co.* v. *Public Service Com'n. of Indiana* (Super. Ct. Marion Co. Feb. 3, 1965). An appeal from that decision is now pending in the Indiana Supreme Court, No. 30733.

A lower court in New York has held that that state's full crew laws are not preempted. *New York Central R. Co.* v. *Lefkowitz*, 46 Misc. 2d 68, 259 N. Y. S. 2d 76 (Sup. Ct. Westchester Co. 1965). However, another court of the same state has held that these laws have been superseded by the federal regulation. *Switchmen's Union* v. *Erie-Lackawanna R. Co.* (Sup. Ct. Erie Co. 1965). Both decisions are now pending on appeal.

An action by the railroads to declare the Ohio full crew laws unconstitutional is scheduled for trial in the Court of Common Pleas,

STATEMENT

Congress enacted Public Law 88-108 to resolve the impasse between the nation's Railroads and the Brotherhoods over the issues of manning levels of freight trains and switch crews. This impasse, which had been developing over a number of years, had reached such a crucial stage that in the summer of 1963 the country was faced with a nationwide strike. To put an end to this dispute Congress directed that a national Arbitration Board be established for the purpose of making a binding award which was to "constitute a complete and final disposition of the aforesaid issues." (§ 3, R. 77)

The scope of authority delegated by Congress to the Board was all inclusive and embraced the subject matter covered by state full crew laws. In making its determination of crew consists the Board was specifically directed to take into consideration the "effect of the proposed award upon adequate and safe transportation service." (§ 7(a), R. 78) In addition to the factor of safety, the Board was also directed to consider the "effect of the proposed award upon the interests of the carrier and employees affected." (§ 7 (a), R. 78) Finally, Congress provided that the arbitration should be conducted pursuant to §§ 7 and 8 of the Railway Labor Act and that the Award should be filed in the manner

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Franklin County, in early 1966. *Akron, Canton & Youngstown R. Co.* v. *Public Utilities Com'n. of Ohio* (Ct. of Common Pleas, Franklin Co.).

A three judge federal court heard argument on May 17, 1965, on the question of supersession of Washington's crew consist laws. *Chicago, Milwaukee, St. Paul & Pacific R. Co.* v. *Pearson,* Civil Action No. 6214 (W. D. Wash.)

The Supreme Court of Wisconsin has apparently ruled that the Wisconsin full crew laws are not preempted and has remanded the case for trial on other constitutional issues. *Chicago & North Western Railway Co.* v. *La Follette,* 135 N. W. 2d 269, 277-78 (Sup. Ct. Wis. 1965).

provided for by that Act, thereby integrating the arbitration provisions of Public Law 88-108 into the Railway Labor Act. (§ 4, R. 77)

Congress did not limit the jurisdiction of the Board in any respect and the Board, in carrying out the mandate of Congress, made its determination on a nationwide basis. The Board concluded that 90% of the firemen assignments in freight and yard operations throughout the nation could be eliminated without affecting safety of operations and without creating an undue work load on the other employees.[3] The Brotherhoods were given the right to designate which of the positions would comprise the 10% to be retained. (Award, R. 84)

To determine train and yard crew consists throughout the country the Board made provision for a procedure whereby the crew consist of freight and yard crews was to be fixed on a local basis by Special Boards of Adjustment. (Award par. III B(1), R. 91; 41 Lab. Arb. 678) It set forth specific guidelines to be followed by these Special Boards, the first and foremost being the "Assurance of adequate safety." (Award, R. 92) Among the other factors to be considered were avoidance of unreasonable work load on the crew members, traffic density, physical characteristics of the line, availability and use of electronic communication equipment, number of highway and railroad crossings requiring protection, amount and nature of work to be performed and the length of train. (Award, R. 92-4) Many of these Special Boards concluded that freight and yard operations in the particular areas involved could be conducted with one trainman or brakeman.

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[3]The Board noted that in freight service three men, the engineer, fireman and head brakeman, were present in the cab of the locomotive. (Opinion, R. 114) In yard service, the Board required installation of a dead-man control before yard locomotives could be operated without firemen. (Award, R. 84) This was in line with the recommendations of the Presidential Railroad Commission.

The entry of the federal government into the regulation of crew consists was preceded by a succession of impartial boards appointed by the federal government in an effort to resolve the conflict. Each recognized that extensive overmanning existed. Their recommendations for determination of crew consists were accepted by the Railroads but rejected by the Brotherhoods.

Thus the carriers accepted—and the Brotherhoods in turn rejected—the recommendations of the Presidential Railroad Commission issued in 1962, the recommendations of Emergency Board No. 154 issued on May 13, 1963, the recommendations of Secretary of Labor Wirtz on July 5, 1963, the proposal of President Kennedy on July 9, 1963 that all issues be submitted to Mr. Justice Goldberg as an impartial arbitrator of the dispute and the proposal by Secretary Wirtz on August 15, 1963 that the parties submit the issues to final and binding arbitration by a six-man board. (R. 103-107)

It was this impasse that prompted Congress to enter into the regulation of crew consists on railroads in interstate commerce[4] and to make provisions for the complete and final disposition of this long standing controversy.

SUMMARY OF ARGUMENT

I. A. The state full crew laws are plainly in conflict with Public Law 88-108 and the Awards of the Arbitration

[4]An earlier impasse in Canada over minimum crew consists resulted in the appointment by the Canadian Government of tribunals to make a compulsory adjudication of the issue. See Report of the Royal Commission of Canada on the Employment of Firemen on Diesel Locomotives in Freight and Yard Service on the Canadian Pacific Railway (1957), authorizing the elimination of all such positions on diesel freight and yard locomotives. See also Report of Montpetit Board of Conciliation (1959), making a similar adjudication with respect to freight and yard locomotives on the Canadian National Railways.

Board and the Special Boards of Adjustment. The national Award decreed abolition of 90% of all firemen assignments throughout the nation and the local Awards of the Special Boards similarly determined train and yard crew consists throughout the nation. These Awards were not limited in scope but specifically applied to full crew law states. Accordingly, the fact of federal regulation of crew consists in full crew law states is indisputable.

B. Since the federal government now regulates the same subject which the full crew laws purport to regulate, such laws are superseded. The argument that the full crew laws merely complement the federal regulation flies in the face of the well established principle that a state may not prohibit conduct expressly authorized by federal law. This principle has been consistently adhered to in striking down state laws specifying higher or different standards for railroad equipment or working conditions of railroad employees than those specified by the federal government.

This Court has recognized the overriding interest of the nation as a whole in fostering federal as opposed to state regulation of labor management relations on interstate railroads. Even where there was no actual conflicting federal legislation or administrative decisions, but rather collective bargaining agreements entered into under the aegis of federal law, state laws in conflict therewith have been held to be preempted. *California* v. *Taylor*, 353 U. S. 553 (1957); *Railway Employees' Dept.* v. *Hanson*, 351 U. S. 225 (1956).

C. The state full crew laws fall within no exception to the doctrine of preemption. The regulation of the manning requirements of interstate railroads is "an inherently likely subject" for federal regulation.

Nor does the fact that the state full crew laws were ostensibly enacted in the exercise of the police power of the particular states preclude their supersession by federal regulation. The federal government, if anything, has a greater interest in the safety of interstate railway operations than does any particular state.

D. The fact that Congress provided that the Award would expire in 1966 does not signify a Congressional intent to have this nationwide problem of crew consists on interstate railroads revert to the haphazard and chaotic situation which precipitated the national emergency in the summer of 1963. While the Award itself expires in 1966, Congress envisaged that its terms would continue in effect until a change was brought about through collective bargaining between the parties under the provisions of the Railway Labor Act, and both Public Law 88-108 and the Awards envisaged a continuing determination of crew consist problems through the collective bargaining process.

II. Where, as here, the tribunals to which Congress delegated the regulation of crew consists on interstate railroads have in fact determined crew consists in full crew law states, speculation as to the subjective intent of Congress and the individual members thereof is an exercise in futility.

Even assuming such an inquiry were proper, it does not reveal an intent to abrogate the normal and foreseeable effect of the entry of the federal government into an area of interstate commerce heretofore left to the states. If there is anything which is clear from the legislative history it is that Congress was repeatedly advised that Congressional entry into the field might supersede full crew laws, absent an express disclaimer to the contrary.

There is no question that under the terms of the Awards a conflict with the full crew laws and consequent preemption did occur. Various predictions as to the effect of the possible awards, made by members of the executive branch, members of Congress and the various parties, establish nothing more than the conceded fact that Congress was aware of the problem and did nothing in the legislation which it enacted to prevent the Boards from acting in full crew law states.

ARGUMENT

I. THE FEDERAL REGULATION OF CREW CONSISTS ON RAILROADS OPERATING IN INTERSTATE COMMERCE CONFLICTS WITH AND THEREFORE SUPERSEDES STATE REGULATION OF THE SAME SUBJECT

The archaic manning requirements of the state crew consist laws typically fix an arbitrary and inflexible minimum crew in all operations throughout the state, consisting of an engineer, fireman and two and sometimes three brakemen, with no reference to local operating conditions. In addition, these laws generally require six men whenever the train exceeds a certain number of cars—twenty-four in Washington and Arkansas, twenty-five in New York and sixty-nine in Indiana—irrespective of the fact that there might be no work whatsoever to be performed enroute.

The directives of the national Award are in direct conflict with the state full crew laws. Its provision that 90% of *all* firemen assignments in freight and yard service were to be eliminated was, by its terms, unlimited. No implication that it was to be restricted to states not having full crew laws may be drawn. Indeed, the applicability of this provision to full crew law states was explicitly pointed out by the Board.

Under Section II, Part B of the Award, the Brotherhoods were given the right to "veto" the remaining 10% of the firemen assignments. (R. 83-4) The Brotherhoods took the position in many instances that exercising this veto was "improper or illegal" in full crew law states. When the Board reconvened on May 17, 1964, pursuant to Section 4 of Public Law 88-108 and Section 7(c) of the Railway Labor Act, for the purpose of clarifying and interpreting its Award, it rejected the Brotherhoods' contention, stating:

> "The obligations and rights of the parties with respect to the listing of jobs and the exercise of the veto under Section II, Parts B(1), B(2), B(3) and B(4) of the Award are the same in the so-called 'full crew law states' as in all other states."[5]

The extent of the conflict between the state and federal regulation of minimum crew consists cannot be fully realized without considering the local Awards of the Special Boards.

There have been a multitude of local Awards on railroad properties running through states having crew consist laws. These Awards explicitly authorize operations with fewer trainmen and brakemen than are mandated by the crew consist laws of the particular state. For instance, in addition to the decisions of the Special Boards in Arkansas (R. 176-185, 186-194, and 194-202), the Special Board ruling on crew consists on the New York and Eastern Districts of the New York Central Railroad found that approximately 300 yard and freight operations within the state of New York could be performed safely and

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[5]Supplement to Arbitration Award No. 282, May 17, 1964, p. 5, filed in the United States District Court for the District of Columbia. *In re Certain Carriers,* Dkt. Misc. No. 41-63.

efficiently with a crew of an engineer, conductor and only one brakeman.[6]

This local Award, coupled with the national Award, established in New York three man crews consisting of an engineer, conductor and one brakeman. The New York full crew laws require five or six man minimum crews for the same operations. Similar local Awards ruling that three man crews are adequate for safe and efficient operations have been made on various railroad properties in other full crew law states.[7]

The approach of the National Board and Special Boards to determine crew consists in light of modern railroading conditions and the work load of the crews is in diametric opposition to the rigid, doctrinaire concept inherent in state crew consist laws that firemen are required on *all* operations irrespective of dieselization and a minimum of two or three trainmen on *all* operations irrespective of automated yards, electronic train control and other improvements. This basic difference in approach makes the conflict between the federal and state regulation deep and inevitable.

Assuming the validity of the state full crew laws, an analysis of the varied crew consists on a freight train running between two of the nation's largest cities, Chicago and New York, illustrates the extent of the disruption

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[6]Award of Special Board of Adjustment in The Matter of the Crew Consist Dispute between New York Central System, New York and Eastern Districts (except Boston and Albany Division), and Brotherhood of Railroad Trainmen, January 6, 1965.

[7]Award of Special Board of Adjustment in The Matter of Crew Consist Dispute Between New York Central System, Southern District, and Brotherhood of Railroad Trainmen, December 29, 1964 (Indiana and Ohio); Award of Special Board of Adjustment in The Matter of Crew Consist Dispute Between New York Central System, Northern District, and Brotherhood of Railroad Trainmen, October 23, 1964 (Indiana and Ohio); Award of Special Board of Adjustment in The Matter of the Crew Consist Dispute Between Chicago & Northwestern Railway, C&NW District, and Brotherhood of Railroad Trainmen, August 31, 1964 (Wisconsin).

caused by the dual federal and state regulation of crew consists.

The crew consist upon leaving Chicago, governed solely by federal law, is an engineer, conductor and two brakemen. At the Indiana border the full crew law of Indiana requires that a fireman and, if the train has more than 69 cars, a third brakeman board the train. The third brakeman rides the train until it reaches Ohio at which point, since he is not required by the Ohio full crew law, he gets off, but the fireman, who is required by that law, stays on to the Pennsylvania border. In Pennsylvania the crew consist is governed solely by federal law, and the fireman leaves the crew at that point. The train then crosses Pennsylvania with the same size crew it had when it left Chicago. Upon entering New York, the crew consist is governed by that state's full crew laws which require a fireman and, if the train has more than 25 cars, a third brakeman.[8]

A. The Fact of Federal Regulation of Crew Consists in States Having Full Crew Laws Is Indisputable

The national Award and local Awards determined the appropriate size of engine and train crew consists in states having full crew laws. As revealed above, the Board explicitly made its directive abolishing 90% of firemen as-

[8]The bizarre situations created by the patchwork of state full crew laws were also noted in the Report of Investigation by the Public Service Commission of New York on the Full Crew Laws (1960), recommending the repeal of those laws (Report, p. 36):

> "One railroad witness made specific mention of a freight run of about 120 miles between Corning, New York, and Newbury Junction, Pennsylvania, on which the railroad, solely by reason of the New York full crew laws, had to assign a third brakeman for only a sixteen-mile portion of the run from Corning, New York, to the Pennsylvania state line, consuming about 45 minutes, the train continuing on for over 100 miles with only two brakemen."

signments applicable to full crew law states. The Special Boards to which the Board delegated the issue of train crew consists also acted in full crew law states and set manning standards different from those imposed by such state laws.[9]

The Brotherhoods were, of course, acutely aware of the conflict between the state full crew laws and the awards. Indeed, they advanced the argument before the Special Boards that the irreconcilable conflict between the state and federal regulation precluded such Boards from ruling on crew consists in full crew law states. Thus, in the opinion rendered in connection with the Award of the Special Board on the Northern District of The New York Central Railroad, the Brotherhoods' position and the Board's reasons for rejecting it are summarized as follows (Opinion of the Neutral Member, p. 9):

> "Since some of the assignments in dispute operate in states with full-crew laws, argues the Organization, those assignments are beyond the jurisdiction of the Board; and the Organization refers specifically to New York, Ohio and Indiana in that context. The Carrier, on the other hand, in addition to arguing that some of the assignments alluded to by the Organization do not operate in Ohio, contends that the existence of full-crew laws in these states in no way infringes on the jurisdictional authority of the Board.

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[9]The delegation by the Board of the train crew consist issue to the various Special Boards has been upheld. *Brotherhood of Loc. Fire. & Eng.* v. *Chicago, B. & Q. R. Co.*, 225 F. Supp. 11 (D. D. C. 1964), *aff'd* 331 F. 2d 1020 (D. C. Cir. 1964), *cert. den.* 377 U. S. 918 (1964). These local Awards are an integral part of the national Award and have "become merged in Award 282." *Brotherhood of Railroad Trainmen* v. *Missouri Pac. R. Co.*, 230 F. Supp. 197, 202 (E. D. Mo. 1964); *Brotherhood of Railroad Trainmen* v. *Chicago, M., St. P. & P. R. Co.*, 237 F. Supp. 404 (D. D. C. 1964), *aff'd and remanded*, 345 F. 2d 985 (D. C. Cir. 1965).

"This Board must rule on the crew consist issue in the light of the dictates set forth in Award 282. And, there is nothing in Award 282 which withholds jurisdictional authority from this Board in those instances where state full-crew laws are in effect. True enough, a finding by this Board in conflict with a state full-crew law creates a problem which the parties must resolve themselves or through litigation in the appropriate legal forum, since the resolution of the conflict is beyond the Board's jurisdiction. But such conflict, while obviously a very important matter, in no way deprives the Board of jurisdictional authority."

The Special Board adjudicating the crew consist disputes on the Boston and Albany Division of The New York Central Railroad also rejected the Brotherhoods' claim that the conflict between the federal and state regulation precluded the Board from acting in full crew law states (Opinion of the Chairman, p. 8):

"The members of Arbitration Board No. 282 were undoubtedly aware that several states had laws and regulations affecting crew consists and if the Board intended to preclude a Special Adjustment Board from acting where such laws and regulations were in existence and might conflict with the decisions of the Special Board, such a restraint would have been expressed. The absence of any reference to such state laws and regulations in the Guidelines established by Board 282, seems to suggest that a Special Adjustment Board should not be inhibited in the exercise of its responsibilities by the presence of such laws and regulations, and that conflicts which occur must be resolved through the initiative

of one or both of the parties before the Award may be executed."

In spite of the conflicts created by the Boards' acting in full crew law states, the Brotherhoods did not challenge before the Board its jurisdiction or that of the Special Boards to make such determinations in full crew law states. The Board's holding in its Supplement to the Award on May 17, 1964, that the provisions of the Award dealing with firemen assignments applied in full crew law states (*supra*, p. 9) was issued in response to a query not by the Brotherhoods but by the Railroads. In light of this holding, the decision of the Brotherhoods not to ask the Board to prevent the Special Boards from acting in full crew law states is thoroughly understandable.[10]

Furthermore, the Brotherhoods sought no court review of the Board's determination of crew consists in full crew law states. The proper exercise by the Board of its jurisdiction is subject to the same review as is provided for decisions of boards of arbitration adjudicating disputes under the Railway Labor Act.[11] *Brotherhood of Loc. Fire. & Eng.* v. *Chicago, B. & Q. R. Co., supra*, p. 12. Its jurisdiction has in fact been challenged by the Brotherhoods with respect to other issues.[12]

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[10]At least one Special Board, in holding that it was proper to determine crew consists in full crew law states, relied upon the Board's holding that the terms of the Award pertaining to firemen applied in such states. Opinion of the Chairman of Special Board of Adjustment in The Matter of Crew Consist Dispute between The New York Central Railroad, Southern District, and Brotherhood of Railroad Trainmen, p. 7, December 29, 1964. The Brotherhoods actually applied for an injunction in the District Court to enjoin this Special Board from issuing an Award determining crew consists in full crew law states, but withdrew the motion. *Id.* pp. 4-5.

[11]Section 4 (R. 77) made any awards issued by the Board subject to the impeachment procedures and jurisdictional challenges contained in Section 9 of the Railway Labor Act, 45 U. S. C. § 159.

[12]*Brotherhood of Railroad Trainmen* v. *Missouri Pac. R. Co., supra*, p. 12; *Brotherhood of Railroad Trainmen* v. *Chicago M., St. P. & P. R. Co., supra*, p. 12.

To summarize, it is indisputable that the Boards have used the power delegated to them by Congress to regulate crew consists in states having crew consist laws. Since this fact is indisputable, appellants' claim that there is no conflict and no supersession stands or falls on the proposition that state regulation in an area of interstate commerce can coexist with federal regulation of the same subject as long as it complements the federal regulation. It is to this argument that we next turn.

B. A State May Not Require Greater Crew Consists in Interstate Railroad Operations Than Those Explicitly Authorized By the Federal Government

Federal legislation supersedes state laws in conflict with it if such state laws deny rights granted by Congress or stand as an obstacle to the full effectiveness of federal law. *Mine Workers* v. *Arkansas Flooring Co.*, 351 U. S. 62 (1956); *Hill* v. *Florida*, 325 U. S. 538 (1945); *Hines* v. *Davidowitz*, 312 U. S. 52 (1941); *McDermott* v. *Wisconsin*, 228 U. S. 115 (1913).

The argument that state full crew laws are not superseded because federal regulation does not prohibit the assignment of additional crew members as required by such state laws is untenable. Where federal law authorizes, even though it does not require, particular conduct, a state statute prohibiting such conduct is superseded and must give way. *Teamsters Union* v. *Oliver*, 358 U. S. 283 (1959); *Franklin Nat. Bank* v. *New York*, 347 U. S. 373 (1954).

This principle has been applied time and time again in striking down state regulation of interstate railroad operations in areas where Congress has acted even though state regulation did not directly contradict federal regulation.[18]

[18] *Missouri Pacific* v. *Porter*, 273 U. S. 341, 346 (1927) (state regulation of contents of bills of lading on interstate shipments), "They [state laws] cannot be applied in coincidence with, as complementary to or as in opposition to, federal enactments which disclose

Cases applying this principle in other areas are legion. See *Hill* v. *Florida, supra; Pennsylvania* v. *Nelson,* 350 U. S. 497 (1956).

The argument advanced by appellants here, namely that the failure of Congress to explicitly prohibit state regulation not directly in opposition to the federal legislation prevents supersession of state regulation on the same subject, was also made and rejected in those cases. This argument was rejected in the strongest terms in *California* v. *Taylor,* 353 U. S. 553 (1957), where this Court held that the provisions of a state's civil service law could in no way govern the working conditions of employees of a state owned railroad who were within the coverage of the Railway Labor Act.

This principle of refusing to allow continued state regulation in an area where Congress has acted has also been applied in cases holding that provisions of collective bargaining agreements specifically authorized by federal law, although mere contracts between private parties, have the "imprimatur of the federal law" and, in *Railway Employees' Dept.* v. *Hanson,* 351 U. S. 225 (1956), were held to supersede state laws regulating the same activity.

As stated in *Teamsters Union* v. *Oliver,* 358 U. S. 283, 296-7 (1959), where this Court held that a collective bar-

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the intention of Congress to enter a field of regulation that is within its jurisdiction"; *Napier* v. *Atlantic Coast Line,* 272 U. S. 605 (1926) (partial regulation of safety equipment on locomotives supersedes state legislation on same subject); *Southern Ry. Co.* v. *R. R. Comm., Indiana,* 236 U. S. 439 (1915) (state regulation of minimum equipment standards for freight cars preempted by the Safety Appliance Act); *Erie R. R. Co.* v. *New York,* 233 U. S. 671 (1914) (state law regulating maximum hours to be worked by railroad telegraphers preempted by Federal Hours of Service Act); *New York Central R. R. Co.* v. *Winfield,* 244 U. S. 147 (1917) (Workmen's Compensation Act of New York preempted by Federal Employers' Liability Act).

gaining agreement made pursuant to the National Labor Relations Act preempted a state's antitrust statute:

> "... Of course, the paramount force of the federal law remains even though it is expressed in the details of a contract federal law empowers the parties to make, rather than in terms in an enactment of Congress."

Where state regulation of employees of interstate railroads has been attempted, this Court has recognized that the interest of the nation as a whole in the railroad industry is an additional and vital reason for holding the federal law to be paramount. Thus, in reaching the conclusion in *California* v. *Taylor,* that under the Railway Labor Act "the terms of the collective-bargaining agreement that they [the state employees] have negotiated with the Belt Railroad would take precedence over conflicting provisions of the state civil service law" (353 U. S., at 561), this Court noted that the "principal unions in the railroad industry are national in scope" and concluded that (353 U. S., at 567):

> "It is by no means unreasonable to assume that Congress, aware of these characteristics of labor relations in the interconnected system which comprises our national railroad industry, intended that collective bargaining, as fostered and protected by the Railway Labor Act, should apply to all railroads. Congress no doubt concluded that a uniform method of dealing with the labor problems of the railroad industry would tend to eliminate inequities, and would promote a desirable mobility within the railroad labor force."

C. The State Laws in Issue Do Not Fall Within Any Exception to the General Rule of Supersession

Appellants rely principally upon *Florida Lime & Avocado Growers* v. *Paul,* 373 U. S. 132 (1963), as support for their contention that where state legislation imposes more stringent requirements than federal legislation, state action is not superseded by the exercise of federal power in the field. (Applts. Br. No. 69, pp. 31-2)

In that case this Court held that a state statute designed to prevent the deception of consumers by prohibiting the sale of avocados with less than 8% oil content was not preempted by a federal marketing regulation, approved by the Secretary of Agriculture, governing the quality and maturity of Florida avocados by criteria other than oil content. The majority opinion distinguished the "decisions which have invalidated direct state interference with the activities of interstate carriers" (373 U. S., at 141) and concluded that the "maturity of avocados seems to be an inherently unlikely candidate for exclusive federal regulation. Certainly it is not a subject by its very nature admitting only of national supervision . . ." (373 U. S., at 143)

Unlike the "maturity of avocados," the regulation of the size of train crews operating in interstate commerce, once exercised on a national scale, should be applied uniformly and indiscriminately throughout the nation to promote the nation's transportation policy and "to eliminate inequities." *California* v. *Taylor, supra,* p. 16; *Cloverleaf Co.* v. *Patterson,* 315 U. S. 148 (1942).

Of course the states are not powerless to prevent anarchy within their borders and protect their citizens against personal injury or property damage threatened by violence or breach of peace. *Allen-Bradley Local* v. *Board,* 315 U. S. 740 (1942); *Garner* v. *Teamsters Union,* 346

U. S. 485, 488 (1953). However, the individual interests of the various states in regulating interstate crew consists is not paramount to that of the federal government.

Appellants' argument that the police power of the states overrides the normal preemptive effect of the federal regulation is in essence an assertion that the interest of a particular state in manning levels entitles it to impose a higher cost of operations upon interstate carriers than the federal government has determined to be necessary for safety of operations. This cost is enormous—over $13,000,000 annually in New York alone.[14] These heavy, additional operating costs in a key interstate industry in and of themselves are strong arguments favoring national uniformity.

Chicago, R. I. & Pac. Ry. Co. v. *Arkansas,* 219 U. S. 453 (1911), and *Missouri Pacific R. Co.* v. *Norwood,* 283 U. S. 249 (1931), which held that the Arkansas full crew laws were not preempted by federal law, are not controlling here. If anything, they sustain the position of appellees because the explicit basis for the Court's decision in each case was the failure of Congress at that time to legislate or establish any regulations pertaining to crew consists.[15]

If the full crew laws are permitted to stand and be enforced, so that the assignments found to be unnecessary and safely dispensable by the Awards are nevertheless required to be filled, not only would nationwide uniformity of

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[14] *New York Central Railroad Co.* v. *Lefkowitz,* 46 Misc. 2d 68, 94, 259 N. Y. S. 2d 76, 103 (Sup. Ct. Westchester Co. 1965).

[15] In the *Norwood* case, this Court phrased the question to be determined as follows (283 U. S., at 256):

> "Has Congress prescribed, or authorized the Interstate Commerce Commission to regulate, the number of brakemen to be employed for the operation of freight trains or the number of helpers to be included in switching crews?"

In the instant case this is precisely what Congress authorized the Board to determine.

application of the Awards be precluded, but the policy established by Public Law 88-108—a national solution to a nationwide problem—would be nullified.

Finally, appellants argue that the emergency which prompted Congress to enter into the regulation of crew consists in interstate commerce could have been settled by the parties to the dispute without affecting the continued viability of state full crew laws, and the ensuing federal regulation of interstate crew consists must therefore give way to all state regulations of the same subject. This argument assumes that the states can continue to regulate in the field of railroad labor relations even though a solution has been arrived at through a collective bargaining agreement between the parties as provided for under the Railway Labor Act. As revealed in Point II of appellees' Brief, this assumption is incorrect.

Furthermore, the argument is a *non sequitur*. Even assuming, *arguendo*, that the Brotherhoods might have had the benefit of the continued effectiveness of state full crew laws had they reached a voluntary settlement with the Railroads, this would in no way have precluded Congress from establishing a nationwide solution to a nationwide problem. The scope of an agreement which the private parties could have reached could not curtail the power of Congress. As revealed above, the federal government not only has the power but has actually regulated crew consists in full crew states. Accordingly, the state regulations must give way.

D. State Crew Consist Laws Will Not Be Reinstated Upon Termination of the Award

The fact that the Award will expire by its terms in 1966 cannot be construed to mean that Congress intended only temporarily to preempt the field. That such was not the in-

tention of Congress is apparent from the fact that Congress anticipated that the solution evolving from the Award would be augmented thereafter by collective bargaining between the parties pursuant to the Railway Labor Act. (§ 4, R. 77)

The District Court rejected the contention that the action by Congress was only of a temporary nature, stating "... we cannot believe that the Congress intended to allow a return of the confusion and chaos that impelled it to act ..." (239 F. Supp., at 29; R. 278)

In establishing a procedure to resolve this issue Congress obviously intended that crew consists would be fixed for a two year period by the Awards and that any subsequent changes would be governed by collective bargaining conducted pursuant to the Railway Labor Act. Such collective bargaining agreements would supersede any state legislation regulating the same subject matter. *California* v. *Taylor, supra,* p. 16; *Teamsters Union* v. *Oliver, supra,* p. 15.

Here Congress has acted to make a "complete", "final" and "binding" disposition of the crew consist issues on a national scale. (§ 3, R. 77) In its opinion the Board expressed the expectation that the parties would pursue collective bargaining[16] so that the problem "will not again make it necessary for the Government to do for the parties what the parties should do for themselves". (R. 97)

If Congress intended that the parties would be free, upon the termination date of the Award in 1966, to disregard the Awards the parties would then be free to take

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[16]In furtherance of this objective the Board inserted a provision in the Award (Part E—Continuing Study) directing the parties to

> "... establish a National Joint Board charged with responsibility for making an intensive and continuing study of the experience in road freight and yard service with and without the employment of firemen (helpers) during the period that this Award remains in effect." (R. 89)

whatever action they deemed appropriate. This would permit the Railroads to eliminate all firemen assignments, as well as all trainmen assignments on freight train and yard crews that they deemed unnecessary, in flagrant disregard of the job protection provisions of the awards. Employees who had been terminated and who had received substantial sums as severance pay would be free to demand reemployment. It is inconceivable that Congress intended such a result.

The safe and efficient operation of railroads is a matter of the utmost national importance. By the enactment of Public Law 88-108 Congress dealt with certain aspects of the problem on a nationwide basis. The attempt by Congress to develop a nationwide solution to a national problem should not now be frustrated by the vagaries in the application of different, outmoded, conflicting and inconsistent standards developed by state governments.

II. THE LEGISLATIVE HISTORY DOES NOT ESTABLISH A CONGRESSIONAL INTENT THAT THE STATE FULL CREW LAWS CONTINUE IN EFFECT

Since the conflict between the federal regulation on the one hand and the full crew laws on the other is patent and irreconcilable, there is no occasion to consider whether the legislative history establishes a subjective intent of Congress to preempt. *Ex Parte Collett,* 337 U. S. 55 (1949); *Packard Co.* v. *Labor Board,* 330 U. S. 485, 492 (1947).

Assuming inquiry into legislative history were proper, it does not appear that any legislative intent to continue the full crew laws in effect can be established. On the contrary, the legislative history discloses that although Congress was repeatedly advised that Public Law 88-108 might

preempt state full crew laws absent an express disclaimer, no such disclaimer was enacted. Congress therefore presumably intended the normal rules of preemption to apply. Under the normal rules, the absence of a provision allowing continued state regulation in the same area in which Congress acted requires a finding of preemption.[17]

That the bill submitted by President Kennedy did not give recognition to the full crew laws was early brought to the attention of the House Committee. When this question was raised, Secretary Wirtz advised the Chairman of the Committee that the bill did not contain a provision authorizing continued state regulation of crew consist. House Hearings, pp. 111-113.

Similarly, the General Counsel of the Interstate Commerce Commission advised the Committees of both houses of this problem and pointed out to the Committees that if Congress intended to avoid supersession of state full crew laws a simple phrase to that effect should be included in the legislation. House Hearings, p. 614; Senate Hearings, pp. 400-401.

Despite these statements Public Law 88-108 contained no such exclusionary language. It is reasonable to conclude that Congress' failure to include such a disclaimer, after this issue had been raised, was not inadvertent. It evidences, we submit, an intent to permit the doctrine of preemption to operate in the normal fashion.

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[17]See *Southern Ry. Co.* v. *R. R. Comm., Indiana,* 236 U. S. 439 (1915). In *California* v. *Taylor,* 353 U. S. 553 (1957), this Court was emphatic in holding that the absence of an express disclaimer indicated a Congressional intent not to restrict the coverage of the federal statute there involved, stating (pp. 564-5):

> "We believe, however, that this argument cuts the other way. When Congress wished to exclude state employees, it expressly so provided. Its failure to do likewise in the Railway Labor Act indicates a purpose not to exclude state employees."

The argument that Congress responded to these comments by eliminating all references to the Interstate Commerce Act from the legislation, and thereby inferentially indicating its intention to avoid supersession of state action, is pure conjecture. Indeed, this contention is flatly belied by the report of the Senate committee responsible for the revision.[18] As that report reveals the Interstate Commerce Commission was not given the task of regulating crew consists because organized labor, including the Brotherhoods, had expressed concern regarding the Commission's competency and impartiality and the possibility of a compulsory arbitration precedent for the entire transportation industry. The facts are that the question of preemption was directly before Congress; that Congress was advised that supersession of state laws could be avoided by including a saving clause to that effect, if such were the intention of Congress; and that no such disclaimer was adopted by Congress.

In these circumstances, neither the expression by the House Committee that it "does not intend" that any award shall supersede state full crew laws nor the views expressed by Congressman Harris to that effect can be taken to express the intent of Congress that its action was intended to be applied only in those states which did not have full crew laws. Indeed, the views of Congressman Harris were immediately challenged by Congressman Smith. 109 *Cong. Record* 15273 (August 28, 1963).

The ambiguous testimony of the parties appearing before the House and Senate Committees certainly indicates no understanding on the part of the parties as to the effect of the legislation on state full crew laws. A representative of the carriers testified that on the basis of his "understanding" as to "our hearing what Secretary Wirtz testified

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[18]S. Rep. No. 459, 88th Cong., 1st Sess. (1963), pp. 8-9.

to yesterday, it would not preempt any State full crew laws." House Hearings, p. 562. On the other hand, representatives of the Brotherhoods testified that "the Commission would have jurisdiction over States' minimum crew bills" (Senate Hearings, p. 478) and that "perhaps the Interstate Commerce Commission could in some way supersede the State full crew laws that were now in effect." (House Hearings, p. 837). If this testimony demonstrates an "understanding" by the parties on the question of preemption it is, at most, an understanding that they were in total disagreement.[19]

Thus, the legislative history, if relevant at all, suggests that Congress did, in fact, intend to preempt the field.

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[19]The Supplemental Rebuttal Statement for the Carriers submitted to the Senate Committee (applts. Br. No. 69, p. 24) simply reflects the fact that adoption by Congress of the proposed Resolution would not permit the *immediate* elimination of excess crew members in full crew law states and that the carriers would be required to comply with the provisions of the laws in effect in those states until such laws were repealed or invalidated by judicial action.

CONCLUSION

For each of the reasons heretofore assigned, it is submitted that the judgment of the District Court should be affirmed.

Respectfully submitted,

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